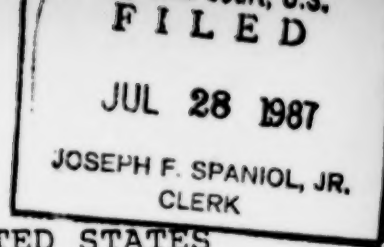


87-168  
No. \_\_\_\_\_



IN THE SUPREME COURT OF THE UNITED STATES  
October Term, 1987

---

Russell Frisby, et al.,

Appellants,

v.

Sandra C. Schultz, et al.,

Appellees.

---

On Appeal From the United States Court  
of Appeals for the Seventh Circuit

---

JURISDICTIONAL STATEMENT

---

Harold H. Fuhrman  
Counsel of Record  
710 N. Plankinton Ave.  
Suite 440  
Milwaukee, WI 53203  
(414) 276-0560

George A. Schmus  
10701 W. National  
West Allis, WI  
53227  
(414) 321-1400

Attorneys for Appellants

4700

#### QUESTIONS PRESENTED

1. Whether § 9.17 of the Town of Brookfield General Code, prohibiting picketing in residential areas, is a reasonable regulation of speech in a limited public forum.

2. Whether the ordinance is a constitutional time, place and manner regulation of speech in a full public forum.

#### PARTIES

Other defendants below and appellants in this Court are George H. Hunt, Robert Wagowski, Harlan Ross, Clayton A. Cramer, and the Town of Brookfield.

The other plaintiff below and appellee in this Court is Robert L. Braun.

## TABLE OF CONTENTS

	<u>Page</u>
Opinions Below . . . . .	1
Jurisdiction . . . . .	2
Constitutional and Ordinance Provisions. . . . .	3
Statement of the Case. . . . .	5
The Question is Substantial. . .	9
I. The Ordinance Is a Reasonable Regulation of Speech in a Limited Public Forum. . . .	11
II. Assuming Brookfield's Resi- dential Streets Constitute a Full Public Forum, the Ordinance is a Constitutional Time, Place and Manner Regu- lation of Speech. . . . .	19
The Ordinance is Content Neutral. . . . .	20
The Ordinance Promotes Significant Governmental Interests. . . . .	21
The Ordinance is Narrowly Tailored . . . . .	23
The Ordinance Leaves Open Ample Alternative Channels of Communication . . . . .	30
The Ordinance is not Overbroad. . . . .	32
Showing as to Abuse of Discretion. . . . .	35
Conclusion . . . . .	38

Appendix A - Judgment Order of the United States Court of Appeals for the Seventh Circuit, April 30, 1987 . . . . .	A-1
Appendix B - Order of the United States Court of Appeals for the Seventh Circuit, April 6, 1987	A-2
Appendix C - Opinion of the United States District Court for the Eastern District of Wisconsin . . .	A-2
Appendix D - Notice of Appeal. .	A-24
Appendix E - Section 9.17, General Code, Ordinances of Town of Brookfield, Wisconsin . . . . .	A-26

## TABLE OF AUTHORITIES

PageCASES:

<u>ACORN v. City of Phoenix</u> , 603 F. Supp. 869 (D. Ariz. 1985), aff'd, 798 F.2d 1260 (9th Cir. 1986) . . . . .	17
<u>Broadrick v. Oklahoma</u> , 413 U.S. 601 (1973) . . . . .	32
<u>Carey v. Brown</u> , 447 U.S. 455 (1980) . . . . .	6, 10, 23, 27, 29
<u>City of New Orleans v. Dukes</u> , 427 U.S. 297 (1976) . . . . .	3
<u>City of Watseka v. Illinois Public Action Council</u> , ____ U.S. ____, 107 S.Ct. 919 (1987) . . . . .	28
<u>City of Watseka v. Illinois Public Action Council</u> , 796 F.2d 1547 (7th Cir. 1986) . . .	28
<u>Cornelius v. NAACP Legal Defense and Education Fund</u> , 473 U.S. 788 (1985) . . . . .	13, 15
<u>Cox v. Louisiana</u> , 379 U.S. 536 (1965) . . . . .	10, 22
<u>Erznoznik v. City of Jacksonville</u> , 422 U.S. 205 (1975) . . . . .	33
<u>Garcia v. Gray</u> , 507 F.2d 539 (10th Cir. 1974), cert. denied, 421 U.S. 971 (1975) . . . . .	9, 10
<u>Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority</u> , 745 F.2d 767 (2d Cir. 1984) . .	15

<u>Gregory v. City of Chicago</u> , 394 U.S. 111 (1969) . . . . .	23, 30
<u>Guinness-Harp Corp. v. Joseph Schlitz Brewing Co.</u> , 613 F.2d 468 (2d Cir. 1980) . . . . .	36
<u>Hague v. CIO</u> , 307 U.S. 496 (1939) . . . . .	12
<u>Jackson County v. Jones</u> , 571 F.2d 1004 (8th Cir. 1978). . .	35
<u>Martin v. City of Struthers</u> , 319 U.S. 141 (1943). . . . .	30
<u>Members of the City Council v. Taxpayers for Vincent</u> , 466 U.S. 789 (1984). 13, 17, 25, 31, 32, 33	
<u>New York v. Ferber</u> , 458 U.S. 747 (1982) . . . . .	32
<u>Pell v. Procunier</u> , 417 U.S. 817 (1974) . . . . .	32
<u>Pennsylvania Alliance for Jobs &amp; Energy v. Council of Munhall</u> , 743 F.2d 182 (3d Cir. 1984). .	16
<u>Perry Education Association v. Perry Local Educators' Association</u> , 460 U.S. 37 (1983). . . . . 11, 12, 14, 19	
<u>Pursley v. City of Fayetteville</u> , No. 86-1332 (8th Cir. filed June 10, 1987) . . . . .	10, 33
<u>Schneider v. New Jersey</u> , 308 U.S. 147 (1939). . . . .	24
<u>Schultz v. Frisby</u> , 818 F.2d 1284 (7th Cir. 1987) . . . . .	3

<u>Schultz v. Frisby</u> , 807 F.2d 1339 (7th Cir. 1986) . . . . .	2
<u>Schultz v. Frisby</u> , 619 F. Supp. 792(E.D. Wis. 1985) . . . . .	1
<u>Student Coalition for Peace v.</u> <u>Lower Merion School Dist.</u> , 596 F. Supp. 169 (E.D. Pa. 1984) . . . . .	18
<u>Trenouth v. U.S.</u> , 764 F.2d 1305 (9th Cir. 1985) . . . . .	16
<u>Wisconsin Action Coalition</u> <u>v. City of Kenosha</u> , 767 F.2d 1248 (7th Cir. 1985) . . . . .	28
 <u>CONSTITUTIONAL PROVISIONS:</u>	
United States Constitution, First Amendment . . . . .	4
United States Constitution, Fourteenth Amendment . . . . .	4
 <u>STATUTES AND ORDINANCES:</u>	
28 U.S.C. § 1254(2) . . . . .	3
28 U.S.C. § 1292(a) (1) . . . . .	2
28 U.S.C. § 1343 . . . . .	2
42 U.S.C. § 1983 . . . . .	7
Town of Brookfield General Code § 9.17. . . . .	4, 7

MISCELLANEOUS:

48A Am. Jur. 2d Labor and Labor Relations § 2051 (1979) . . . .	26
Webster's Third International Dictionary (1961) . . . . .	26
11 C. Wright & A. Miller, Federal Practice and Procedure § 2962 (1973) . . . .	37

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

---

No. \_\_\_\_\_

Russell Frisby, et al.,

Appellants,

v.

Sandra C. Schultz, et al.,

Appellees.

---

On Appeal From the United States Court  
of Appeals for the Seventh Circuit

---

JURISDICTIONAL STATEMENT

---

OPINIONS BELOW

The judgment order of the Seventh Circuit Court of Appeals (App. A, A-1) is unreported. The opinion of the District Court for the Eastern District of Wisconsin (App. C, A-3) is reported as Schultz v. Frisby, 619 F. Supp. 792 (E.D. Wis. 1985).

## JURISDICTION

This is an appeal from a judgment order of the Seventh Circuit Court of Appeals dated April 30, 1987, that affirmed the judgment of the District Court for the Eastern District of Wisconsin and remanded the case to that court. Jurisdiction in the court of appeals was based on 28 U.S.C. § 1292(a)(1). The district court order was filed on October 7, 1985. Jurisdiction in that court was based on 28 U.S.C. § 1343. The district court granted a preliminary injunction enjoining appellants from enforcing an ordinance of the Town of Brookfield because the ordinance was likely to fail the test of a constitutional time, place, and manner regulation of speech in a public forum (App. C, A-22). A panel of the appellate court originally heard the case and issued an opinion reported at 807 F.2d 1339 (7th Cir. 1986). The court then vacated that opinion and granted a rehearing en banc.

Schultz v. Frisby, 818 F.2d 1284 (7th Cir. 1987) (App. B, A-2). After rehearing, the court by an evenly divided court affirmed the district court order without opinion. (App. A, A-1).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(2), because the district court found the ordinance was likely to be found unconstitutional. A municipal ordinance is considered a state statute for the purposes of 28 U.S.C. § 1254(2). City of New Orleans v. Dukes, 427 U.S. 297, 301 (1976).

A notice of appeal to this Court (App. D, A-24) was filed on July 16, 1987 with the clerk of the Seventh Circuit Court of Appeals and the clerk of the District Court for the Eastern District of Wisconsin.

#### CONSTITUTIONAL AND ORDINANCE PROVISIONS

The first amendment to the United States Constitution provides in pertinent part:

Congress shall make no law  
... abridging the freedom of  
speech . . .

U.S. Const. amend. I.

The fourteenth amendment to the  
United States Constitution provides in  
pertinent part:

No State shall make or enforce any  
law which shall abridge the  
privileges or immunities of citizens  
of the United States . . .

U.S. Const. amend. XIV, § 1.

Section 9.17, General Code, Ordi-  
nances of Town of Brookfield provides in  
pertinent part:

(2) PICKETING RESIDENCE OR DWELLING  
UNLAWFUL. It is unlawful for any  
person to engage in picketing before  
or about the residence or dwelling of  
any individual in the Town of  
Brookfield.

Town of Brookfield, Wis., General Code,  
Ordinances § 9.17 (1985). Appendix E  
(A-26) sets forth the entire text of the  
ordinance.

## STATEMENT OF THE CASE

Between April 20 and May 20, 1985, appellees Sandra Schultz and Robert Braun, together with groups of other antiabortion demonstrators, picketed the home of Dr. Benjamin Victoria. Dr. Victoria apparently performs abortions as part of his medical practice in the cities of Appleton and Milwaukee. The groups of picketers ranged in size from eleven to more than forty persons, and they picketed on at least six different occasions during the one month-period.

Dr. Victoria's home, at 750 North Briarridge Drive, is in the Black Forest Subdivision of the Town of Brookfield, Wisconsin. The zoning in the subdivision is exclusively single family residential. All of the residential streets in Brookfield are approximately thirty feet wide, sufficient for one vehicle in each direction; there are no sidewalks.

The Town of Brookfield is a residential suburb of the City of Milwaukee. It has a population of approximately 4,300 persons, and an area of 5½ square miles. Considerable business and commercial development is clustered along West Bluemound Road (State Highway 18); the remainder of the Town is residential.

The picketing spawned numerous complaints and reports to the town's police department. On May 7, 1985, the Brookfield Town Board enacted an ordinance that prohibited all picketing in residential areas except labor picketing. The ordinance never was enforced because appellant Town Attorney Clayton Cramer determined that it was probably unconstitutional under Carey v. Brown, 447 U.S. 455 (1980). The Town Board repealed the ordinance and passed, on May 15, 1985, a substitute ordinance that declared simply, "[i]t is unlawful for any person to engage in picketing before or about the residence

or dwelling of any individual in the Town of Brookfield." Town of Brookfield, Wis., General Code, Ordinance § 9.17 (1985) (App. E, A-28). Appellees have refrained from picketing since the effective date of the ordinance, May 21, 1985.

Appellees Schultz and Braun filed a complaint under 42 U.S.C. § 1983, seeking declaratory and preliminary and permanent injunctive relief from an alleged deprivation of their rights under the first and fourteenth amendments of the United States Constitution. The district court heard appellees' motion for a preliminary injunction on August 13, 1985. Appellants argued in their brief that the ordinance is content-neutral and was enacted to promote the Town's interests in preserving the tranquility and privacy of the home and neighborhood, as well as public safety. The district court granted a preliminary injunction on October 7, 1985 (App. C, A-22). The court held that the

ordinance was likely to fail the test of a constitutional time, place and manner regulation of speech in a public forum, and its order provided that the preliminary injunction would become permanent if the Town did not appeal and if neither party requested a trial within sixty days. (App. C, A-23).

Appellants appealed to the Seventh Circuit Court of Appeals, and argued in their brief that the ordinance does not violate the first and fourteenth amendments of the Constitution because it is a content-neutral, time, place and manner regulation; it is narrowly tailored to serve a significant governmental interest, and it leaves open ample alternative channels of communication. A panel of the Court of Appeals heard the case on April 9, 1986. The court granted appellants' motion for rehearing, and the full court heard the case on April 29, 1987. The decision and order of the court of

appeals affirmed the district court order by an evenly divided court without opinion and remanded the case for any further proceedings deemed necessary. (App. A, A-1).

#### THE QUESTION IS SUBSTANTIAL

The district court granted, and the appellate court affirmed, a temporary injunction preventing the Town of Brookfield from enforcing an ordinance that would protect its residents from the loss of safety and privacy caused by picketers outside their homes. The court determined that the ordinance was likely to violate the first and fourteenth amendments of the Constitution. Because of the significance of the question, resolution by this Court is appropriate.

In addition, a similar ordinance has been upheld by the Tenth Circuit Court of Appeals in Garcia v. Gray, 507 F.2d 539 (10th Cir. 1974) cert. denied 421 U.S. 971 (1975). That court held that the anti-residential picketing ordinance was a

valid exercise of governmental power to insure the privacy and tranquility of the town's residents. 507 F.2d at 545. The Seventh Circuit's decision in this case, and the Eighth Circuit's decision in Pursley v. City of Fayetteville, No. 86-1332 (8th Cir. filed June 10, 1987), directly contradict the Garcia holding. Resolution by this Court therefore is necessary, especially in light of the fact that the court of appeals affirmed the district court's order by an evenly divided court and without issuing an opinion.

It is well settled that picketing is the type of conduct that may be regulated in a reasonable manner by a municipality. See Cox v. Louisiana, 379 U.S. 536, 581 (1965). "[T]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." Carey v. Brown, 447 U.S. 455, 471 (1980). Depending on the status of

the forum in which the speech takes place, a regulation such as Brookfield's, in order to be constitutional, must be a reasonable time, place, and manner restriction of speech in a full public forum, id. at 470, or must be reasonable in light of the purpose of the "limited" public forum. Perry Education Association v. Perry Local Educators Association, 460 U.S. 37, 47 (1983). Appellants contend that the Brookfield residential picketing ordinance meets both tests, and the district court erred in enjoining its enforcement.

I. The Ordinance Is A Reasonable Regulation Of Speech In A Limited Public Forum.

The district court, in summarily granting what in effect is a permanent injunction, invited no argument upon the question of whether the residential streets of the Town constituted a traditional, full, public forum, but instead merely assumed that they did. That assumption is based upon the

conclusion that "streets . . . 'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" Hague v. CIO, 307 U.S. 496, 515 (1939); quoted in Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). Appellants, however, submit with all due respect that the question is not sufficiently addressed by this statement.

It is submitted that the question of the actual forum status of a given residential street or cul-de-sac has never been precisely presented to this Court. That argument is now advanced. Perry acknowledged that the very existence of the right to access to public property, and the standard by which limitations on such right must be evaluated, differed depending on the character of the property

at issue. 460 U.S. at 44. Brookfield submits that its residential streets are not traditional or dedicated, full, public fora for all forms of expression.

The district court applied the 'full-forum' test, mentioned in Perry and and discussed infra, to the ordinance. Perry also noted an alternative status of a "limited" public forum, however. Id. at 47. It is submitted that, at most, Brookfield's residential streets constitute only a limited public forum. In the case of a limited forum, the standard for evaluating a regulation that limits speech is whether it is 1) reasonable, and 2) not an effort to suppress expression just because the public officials oppose the speaker's views. Cornelius v. NAACP Legal Defense and Education Fund, 473 U.S. 788, 806 (1985); Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 815 (1984).

It has never even been established in this case that the residential streets in question are owned by the government. However, this Court has:

recognized that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." In addition to time, place and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. As we have stated on several occasions, "the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."

Perry, 460 U.S. at 46 (citations omitted). The residential streets in question have never been held open to all members of the general public to congregate upon, regardless of their own place of residence and lack of business or social purpose for being there. Hence, the inquiry must turn to whether such strangers are allowed to enter and remain for the precise purpose of picketing. In this regard, it is

observed that the mere fact that an instrumentality is used for the communication of ideas does not make it a public forum. Perry, 460 U.S. at 49, n.9.

In Cornelius, this Court viewed the relevant forum as a charity drive, rather than the governmental premises upon which it was held. 473 U.S. at 801. The principle thus appears to be that the relevant forum involves participation in a certain activity rather than merely the place in which it transpires. This more openly explains the basis for the forum analysis in Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority, 745 F.2d 767 (2d Cir. 1984), wherein in determining whether a forum exists, the court examined whether a particular form of expression is inappropriate for, or incompatible with, the character of the property and its intended use. Id. at 773. Thus, in that case it was held that public areas in a

commuter train station did not constitute a public forum. Id. Likewise, in Trenouth v. United States, 764 F.2d 1305 (9th Cir. 1985), the court held a truck parking area not to be a public forum. Id. at 1309.

As this 'activity' analysis has been applied most analogously to date, Pennsylvania for Jobs & Energy v. Council of Munhall, 743 F.2d 182 (3d Cir. 1984), held that door-to-door canvassing of private homes is plainly not a public forum. Id. at 187. "Indeed, the Supreme Court has noted that, because of the countervailing privacy interests of householders, [o]f all the methods of spreading unpopular ideas, house to house canvassing seems the least entitled to extensive protection." Id. at 186 (citations omitted). Because of identical privacy interests of householders here, and of their interests in safety as well, residential picketing is likewise least entitled to extensive protection as speech.

Most directly, ACORN v. City of Phoenix, 603 F. Supp. 869 (D. Ariz. 1985), aff'd, 798 F.2d 1260 (9th Cir. 1986), held streets not to be a traditional public forum for purposes of soliciting donations. Id. at 871. The court held that, given traffic considerations, a forum did not exist in an intersection. Id. The court observed that "[t]he cases cited . . . refer to 'streets' as public forums, typically in the context of sidewalks and other locales traditionally reserved for public communication." Id. at 870 (emphasis supplied). It should be observed again that the residential streets here have no sidewalks, nor any area at all "traditionally reserved for public communication."

Likewise, this Court in Members of the City Council v. Taxpayers for Vincent held that sidewalks, crosswalks, curbs, lampposts, hydrants, trees, shrubs and other various items of public property in public rights of way did not constitute a

public forum at all. 466 U.S. at 814. In examining the matter, the Court noted the city's power to improve its appearance, and stated that "the mere fact that government property can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted." Id. Here, as well, Brookfield retains its right to provide for residential privacy, tranquility and safety, goals submitted to be more fundamental than aesthetic. Because it does not appear that the residential streets have ever been used for picketing, they are not a public forum for that purpose. Cf. Student Coalition for Peace v. Lower Merion School Dist., 596 F. Supp. 169 (E.D. Pa. 1984).

Because no traditional picketing forum thus exists, the applicable standard of review of the anti-residential picketing ordinance herein is whether it is 1) reasonable; and 2) not an effort to

suppress expression just because the public officials oppose the speaker's view. The latter is clear and, indeed, no such animus was alleged here. As to reasonableness, it is submitted on the strength of the foregoing facts and argument and the following observations that the regulation was not only reasonably authorized by the circumstances, it was absolutely required. Under this test, there is no requirement that restrictions of access be narrowly tailored or that the government's interest be substantial although, as will be seen infra, both were the case here.

II. Assuming Brookfield's Residential Streets Constitute a Full Public Forum, The Ordinance Is A Constitutional Time, Place And Manner Regulation Of Speech.

A time, place, and manner regulation of speech in a public forum, such as a public street, must pass the test laid out in Perry Education Association v. Perry Local Educator's Association, 460 U.S. 37

(1983), to be constitutional. The regulation must be 1) content neutral, 2) designed to advance a significant governmental interest, 3) narrowly tailored to promote that significant governmental interest, and 4) leave open ample alternative channels of communication. Id. at 45.

The Ordinance is Content Neutral

The district court correctly concluded that the ordinance is content neutral. See App. C, A-17. The ordinance bans picketing in residential areas to promote any point of view. An earlier version of the ordinance would have barred all residential picketing except labor picketing, but that version was repealed based on this Court's decision in Carey v. Brown. In that case, the Court held that a residential picketing ordinance that excepted labor picketing violated the equal protection clause of the Constitution, although the Court expressly

reserved judgment in regard to the constitutionality of legislation prohibiting all residential picketing. 447 U.S. at 458, in footnote 2.

The Ordinance Promotes Significant  
Governmental Interests

The interests the Town of Brookfield seeks to advance by the ordinance are public safety and privacy. See App. E, A-26, A-27. These are significant interests, as the district court correctly concluded. Maintaining the safety of public streets is clearly one of the responsibilities of a municipality. Streets in residential Brookfield are only thirty feet wide, and there are no sidewalks. Picketers walking on the street undoubtedly place themselves in danger from passing vehicles. This would be particularly true if, as in this case, the picketers parked cars and buses on the street. Other pedestrians using the street also would be endangered because

drivers would become distracted by the picketers. Vehicular traffic would be interfered with as well.

Brookfield's restriction of picketing on residential streets is intended to prevent these problems and aid in carrying out the Town's duty. Even in traditional public forums, restrictions on speech are permitted to promote public safety. In Cox v. Louisiana, 379 U.S. 536 (1965), this Court stated that a restriction to control travel on public streets, "designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right, which, in other circumstances, would be entitled to protection." Id. at 557.

An equal, if not more important, government interest the ordinance seeks to advance is privacy. The district court correctly found that protecting the

privacy of the home is a significant enough interest to justify regulation of speech. See App. C, A-18. This Court has recognized that:

[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape the tribulations of their daily pursuits, is surely an important value. Our decisions reflect no lack of solicitude for the right of an individual to "to be let alone" in the privacy of the home, "sometimes the last citadel of the tired, the weary, and the sick."

Carey v. Brown, 447 U.S. at 471 (quoting Gregory v. Chicago, 394 U.S. 111, 125 (1969) (Black, J., concurring)).

#### The Ordinance is Narrowly Tailored

In contrast to its findings on the issues of content neutrality and significance, the district court erred in its determination that the ordinance is not narrowly tailored. The district court did not specify the standard it used in analyzing this element, but the correct standard was articulated by this Court in

Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984). In its analysis of the constitutionality of a city ordinance that prohibited posting signs on public property, this Court stated that "the city did no more than eliminate the exact source of the evil [visual blight] it sought to remedy." Id. at 808. The Court contrasted the ordinance with the one found unconstitutional in Schneider v. State, 308 U.S. 147 (1939), which prohibited all handbilling on streets as a way to reduce litter:

With respect to signs posted by appellees, however, it is the tangible medium of expressing the message that has the adverse impact on the appearance of the landscape. In Schneider, an antilittering statute could have addressed the substantive evil without prohibiting expressive activity, whereas application of the prophylactic rule actually employed gratuitously infringed upon the right of an individual to communicate directly with a willing listener. Here, the substantive evil - visual blight - is not merely a possible by-product of the activity, but is created by the medium of expression itself. In contrast to Schneider, therefore, the application of the ordinance in this case responds

precisely to the substantive problem which legitimately concerns the City. The ordinance curtails no more speech than is necessary to accomplish its purpose.

Vincent, 466 U.S. at 810.\*

Brookfield's ordinance likewise "curtails no more speech than is necessary to accomplish its purpose." The evils the Town is attempting to prevent are unsafe streets and invasion of residential privacy. The medium of expression --

---

\* The Seventh and Eighth Circuit Courts of Appeals have adopted a different standard in analyzing the "narrowly tailored" element of the test of a time, place and manner regulation of speech. Those courts require that a regulation be the "least restrictive" means of restricting speech that will serve the governmental objective. See City of Watseka v. Illinois Public Action Council, 796 F.2d 1547 (7th Cir. 1986), aff'd, \_\_\_ U.S. \_\_\_, 107 S. Ct. 919, 920 (1987); Association of Community Organizations for Reform Now v. City of Frontenac, 714 F.2d 813 (8th Cir. 1983). However, this Court has stated that "[t]he less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place and manner regulation." Regan v. Time, Inc., 468 U.S. 641, 652 (1984); see also City of Watseka v. Illinois Public Action Council, \_\_\_ U.S. \_\_\_, 107 S. Ct. 919, 920 (1987) (White, J., dissenting).

picketing -- creates these evils, as discussed supra. Picketing is not defined in the Brookfield ordinance, but a generally accepted definition is: "to walk or stand in front of as a picket . . . ." Websters Third International Dictionary 1710 (1961). A "picket" is defined as "a person posted by a labor organization at an approach to the place of work affected by a strike . . .; also: one posted similarly in a demonstration as a protest against a policy of government." Id. See also 48A Am. Jur. 2d Labor and Labor Disputes § 2051 (1979). Persons engaged in this sort of activity in residential areas, especially where there are no sidewalks, create a threat to safety and an invasion of the privacy of homes.

The amount of speech curtailed is small; only picketing is prohibited, while many other forms of expression, as discussed infra, are allowed. The complete

ban on residential picketing is necessary to advance Brookfield's purposes. Even one picket is an unacceptable intrusion into the privacy of those whose home is being picketed:

Unlike sound trucks, it is not just the distraction of the noise which is in issue - it is the very presence of an unwelcome visitor at the home. As a Wisconsin court described in Wauwatosa v. King, 49 Wis. 2d 398, 411-412, 182 N.W.2d 530, 537 (1971):

"To those inside . . . the home becomes something less than a home when and while the picketing . . . continues[s]. . . . [The] tensions and pressures may be psychological not physical, but they are not, for that reason less inimical to family privacy and truly domestic tranquility."

Whether noisy or silent, alone or accompanied by others, whether on the streets or on the sidewalk, I think that there are few of us that would feel comfortable knowing that a stranger lurks outside our home.

Carey v. Brown, 447 U.S. at 478-79 (Rehnquist, J., dissenting). Furthermore, even a single picket could distract motorists and be a hazard to himself and others.

The district court suggested that the ordinance could be narrowed by limiting the time during which picketing could occur, or by placing a seasonal restriction on the activity. (App. C, A-19). Privacy and safety would suffer no matter what time of day the picketing occurred, however. In addition, ordinances restricting the time during which speech activities can be carried out in neighborhoods have been found unconstitutional. See City of Watseka v. Illinois Public Action Council, 796 F.2d 1547 (7th Cir. 1986) aff'd, \_\_\_ U.S. \_\_\_, 107 S.Ct. 919, 920 (1987) (ordinance limiting door-to-door soliciting to the hours between 9:00 a.m. and 5:00 p.m. Monday through Saturday unconstitutional); Wisconsin Action Coalition v. City of Kenosha, 767 F.2d 1248, 1259 (7th Cir. 1985) (ordinance prohibiting door-to-door soliciting between 8:00 p.m. and 8:00 a.m. unconstitutional as applied to the hour between

8:00 p.m. and 9:00 p.m.). A seasonal restriction also would not advance Brookfield's interests sufficiently. While picketing could be more dangerous during the winter, it would be more disruptive of tranquility during the summer.

Finally, the Town of Brookfield has the responsibility to protect its citizens from unwanted and dangerous intrusions into their lives. "It is the [municipality], not this Court, which legislates to prohibit evils which its citizens find unescapable, subject only to the limitations of the United States Constitution." Carey v. Brown, 447 U.S. at 478 (Rehnquist, J., dissenting). The Town has determined that a ban on residential picketing is the only way to protect the safety and privacy of its citizens, while still allowing the protesters other methods of expressing their views.

The Ordinance Leaves Open Ample  
Alternative Channels of Communication

The final element of the four-part test of a time, place, and manner regulation requires that there be ample alternative channels of communication. The district court did not determine whether this element had been met, because of its decision that the ordinance was not narrowly tailored. Nevertheless, appellees here do have ample alternative means in which to communicate their message to the public.

The ordinance prohibits only picketing, defined as standing or patrolling, in residential areas of Brookfield. Protesters have not been barred from the residential neighborhoods. They may enter such neighborhoods, alone or in groups, even marching, see Gregory v. City of Chicago, 394 U.S. 111, 112 (1969). They may go door-to-door to proselytize their views. They may distribute literature in this manner, see Martin v. City of

Struthers, 319 U.S. 141, 143 (1943), or through the mails. They may contact residents by telephone, short of harassment. They are barred only from picketing there, due to the uniquely invasive and potentially dangerous nature of that particular conduct.

Appellees in this case have not shown that they have a particular need to picket in residential areas. See Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984) ("nothing in the findings indicates that the posting of political posters on public property is a uniquely valuable or important mode of communication . . ."). They may picket or engage in other forms of peaceful protest in commercial areas of Brookfield and in parks. "[W]hen speech interests are countered by other substantial governmental interests the availability of another forum is a highly relevant factor in determining the appropriate balance. See

Pell v. Procunier, 417 U.S. 817, 823-24 (1974)." Carey v. Brown, 447 U.S. 482, n.3 (Rehnquist, J., dissenting). Appellees have ample alternative methods and forums for communicating their views.

### III. The Ordinance is Not Overbroad.

The district court did not reach the alternative argument of appellees that the residential picketing ordinance is unconstitutionally overbroad. Nevertheless, it is appropriate to discuss that argument in general defense of the constitutional validity of the ordinance.

This Court has stated that, particularly if conduct and not merely speech is involved, "the over-breadth of a statute must not only be real, but substantial as well." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973); see also Members of the City Council v. Taxpayers v. Vincent, 466 U.S. at 799-801; New York v. Ferber, 458 U.S. 747, 770-71 (1982). "[T]he mere fact that one can conceive of some impermiss-

able applications of a statute is not sufficient to render it susceptible to an over-breadth challenge." Vincent, 466 U.S. at 800. Moreover, ordinances and statutes "should not be deemed facially invalid unless [they are] not readily subject to a narrowing construction by the state courts." Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975).

No doubt one could imagine an application of Brookfield's antiresidential picketing ordinance that would be an impermissible restriction of speech. The Eighth Circuit Court of Appeals in Pursley v. City of Fayetteville, No. 86-1332 (8th Cir. filed June 10, 1987), however, did just that when it examined an ordinance similar to Brookfield's, and determined that it was overbroad. Id., slip op. at 10. The court stated that because residences are "often located close to the hubbub of daily commerce," the ordinance, which prohibited demonstrations and

picketing "before or about the residence or dwelling place of any individual," could prohibit picketing in busy commercial areas. Id. According to the court, this result would not affect the city's goals. Id.

The Eighth Circuit failed to consider the possibility of a state court narrowing the construction of the ordinance if a situation ever arose that required such action. See id. at 15 (Gibson, J., dissenting). The Brookfield ordinance also could be narrowed by a state court if necessary. However, any narrowing of the ordinance as it is written, for example by limiting the number of picketers or the time of picketing, would not advance Brookfield's legitimate goals of protecting the safety and privacy of Brookfield residents, as discussed earlier.

SHOWING AS TO ABUSE OF DISCRETION

Appellants submit that because of the final nature of the district court's order and because of its errors of law, this Court is not constrained to reviewing the district court's decree granting a preliminary injunction only for abuse of discretion, but may review the case on the merits. The district court's order of preliminary injunctive relief was designed to ripen into a final disposition, by becoming permanent, in the absence of an appeal and a request for trial within sixty days (App. C, A-23). The court was willing to allow a permanent injunction to come into being without conducting a full trial. Indeed, it would appear that most, if not all, available evidence was before the court by way of documents and affidavits at the hearing for a temporary injunction. There are no additional issues that the court need consider. In Jackson County v. Jones, 571

F.2d 1004 (8th Cir. 1978), the court held that an appeal of a preliminary injunction should be considered by the appellate court on the merits because the district court considered the matter on the basis of all available evidence; there was no reasonable likelihood that further evidence could be addressed at full trial on the merits; and it was readily apparent that the decision would, for all practical purposes, end the case. Id. at 1007. See also Guinness-Harp Corp. v. Joseph Schlitz Brewing Co., 613 F.2d 468, 471 (2d Cir. 1980). An identical situation exists here. No purpose would be served by the district court conducting a trial to determine whether to grant a permanent injunction.

In this case virtually all of the facts were undisputed. Hence, the decision of the district court is based on points of law. Because error therein is the subject of appeal here, no deference

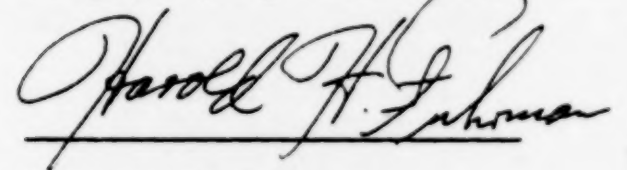
to the trial court's discretion is required. "[I]f the lower court's decision rests on an interpretation of the law rather than on the facts, the appellate court is not as limited in its review and may reverse if it feels that the lower court's view of the law was erroneous."

11 C. Wright & A. Miller, Federal Practice and Procedure § 2962 at 636-7 (1973) (footnotes omitted). Error in discerning the law and/or applying it simply constitutes whatever excess or abuse of discretion is unquestionably the proper subject of review. Thus, in a case such as this, in which the merits have been effectively disposed of by the district court, and error in doing so is claimed, plenary review is proper.

CONCLUSION

Probable jurisdiction should be  
noted.

Respectfully submitted,

A handwritten signature in cursive script, reading "Harold H. Fuhrman", written over a horizontal line.

Harold H. Fuhrman

George A. Schmus  
Attorneys for the Appellants

APPENDIX A

Judgment Order  
United States Court of Appeals  
For The Seventh Circuit  
April 30, 1987

No. 85-2950 )  
 )  
SANDRA C. SCHULTZ AND ) Appeal from the  
ROBERT C. BRAUN, ) United States  
Plaintiffs-Appellees, ) District Court  
 ) for the Eastern  
v. ) District of  
 ) Wisconsin  
RUSSELL FRISBY, et al., ) No. 85 C 1018  
Defendants-Appellants. ) JOHN W. REYNOLDS,  
 ) Judge

This cause was reheard en banc on the record from the United States District Court for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court granting the plaintiffs' request for a temporary injunction is AFFIRMED, with costs, in accordance with the order of this Court entered this date. The case is returned to the District Court for any further proceedings deemed necessary.

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit  
Chicago, Illinois 60604

UNPUBLISHED ORDER

NOT TO BE CITED

PER CIRCUIT RULE 53

April 30, 1987

Before

Hon. WILLIAM J. BAUER, Chief Judge  
Hon. WALTER J. CUMMINGS, Circuit Judge  
Hon. HARLINGTON WOOD, JR., Circuit Judge  
Hon. RICHARD D. CUDAHY, Circuit Judge.  
Hon. RICHARD A. POSNER, Circuit Judge  
Hon. JOHN L. COFFEY, Circuit Judge  
HON, JOEL M. FLAUM, Circuit Judge  
Hon. FRANK H. EASTERBROOK, Circuit Judge  
Hon. DANIEL A. MANION, Circuit Judge  
\*Hon. LUTHER M. SWYGERT, Senior Circuit Judge

SANDRA C. SCHULTZ and  
ROBERT C. BRAUN

Plaintiffs-Appellees,

Appeal from the  
United States District  
Court for the Eastern  
District of Wisconsin.

No. 85-2950 v.

John W. Reynolds, Judge  
No. 85 C 1018

RUSSELL FRISBY, GEORGE R. HUNT,  
ROBERT WARGOWSKI, HARLAN ROSS,  
CLAYTON A. CRAMER, and the  
TOWN OF BROOKFIELD  
Defendants-Appellants.

ORDER

On April 6, 1978, this Court ordered that the panel opinion reported at 807 F. 2d 1339 (1986) be vacated and that the case be reheard en banc. After rehearing this Court, by an equally divided vote, affirms the judgment of the district court granting the plaintiffs' request for a temporary injunction. The case is returned to the district court for any further proceedings deemed necessary.

\* The Honorable Luther M. Swygert, Senior Circuit Judge, heard the arguments as a member of the original panel. He listened to the tapes of the en banc argument and voted afterward.

\*\*The Honorable Kenneth F. Ripple, Circuit Judge, did not participate at all in this appeal.

APPENDIX B

Order of the United State Court  
of Appeals for the Seventh Circuit  
April 6, 1987

No. 85-2950 )  
 )  
SANRA C. SCHULTZ AND ) Appeal from the  
ROBERT C. BRAUN, ) United States  
Plaintiffs-Appellees, ) District Court  
 ) for the Eastern  
v. ) District of  
 ) Wisconsin  
RUSSELL FRISBY, et al., ) No. 85 C 1018  
Defendants-Appellants. ) JOHN W. REYNOLDS,  
 ) Judge

Before BAUER, Chief Judge.

Prior report: 7th Cir., 807 F.2d 1339.

A majority of the circuit judges in regular active service have voted to grant the suggestion for rehearing en banc in the above cause.

The panel decision of December 8, 1986 is VACATED pursuant to Internal Operating Procedure 5(f).

APPENDIX C

Opinion of the United States  
District Court For The  
Eastern District of  
Wisconsin

-----  
SANDRA C. SCHULTZ and  
ROBERT C. BRAUN,

Plaintiffs,

v.

Civil Action  
No. 85-C-1018

RUSSELL FRISBY,  
GEORGE E. HUNT,  
ROBERT WARGOWSKI,  
HARLAN ROSS,  
CLAYTON A. CRAMER, and the  
TOWN OF BROOKFIELD,

Defendants.

-----  
DECISION AND ORDER  
-----

This is an action to enjoin the  
enforcement of an anti-picketing ordi-  
nance.

Plaintiffs Sandra C. Schultz and  
Robert C. Braun filed a complaint on  
July 2, 1985, under § 1983 of Title 42  
U.S.C., seeking declaratory, preliminary,  
and permanent injunctive relief from an

alleged deprivation of their rights under the First and Fourteenth Amendments of the United States Constitution. Defendants in the action are Russell Frisby and George Hunt, Supervisors of the Town Board of Brookfield, Wisconsin; Robert Wargowski, Chairman of the Town Board; Harlan Ross, Chief of the Brookfield Police; Clayton Cramer, attorney for the Town of Brookfield; and the Town of Brookfield itself.

The plaintiffs wish to picket on streets in a residential neighborhood in Brookfield. They challenge the enforcement of a town ordinance which bans such picketing. This court has jurisdiction under 28 U.S.C. § 1343.

At the hearing for a preliminary injunction held on August 13, 1985, the Court considered the facts contained in the following submissions:

(1) plaintiffs' proposed statement of facts; (2) defendants' proposed statement of facts; (3) §§ 9.05, 9.06, 9.08, 9.09,

9.10, 9.17, 9.943.13, 9.943.14, and 9.947.01 of the General Code, Town of Brookfield; (4) a plat map of the Summit Lawn Estates and Black Forest Knoll, Town of Brookfield; (5) a photocopy of a story and accompanying photograph in the May 21, 1985, edition of the Milwaukee Sentinel; and (6) affidavits of Mary T. Baxa, Robert C. Braun, Mary E. Bruders, Reid Brueser, Scott M. Heitman, William B. Peterman, Sandra C. Schultz, Daniel J. Schwantz, Charles Setzke, Mary Setzke, David Setzke, Paula W. Smith, Arlene Victoria, Todd A. Victoria, and Aundrey Wright.

Based on the above-cited materials and on the oral arguments, I make the following findings of fact and conclusions of law.

#### FINDINGS OF FACT

Plaintiffs Sandra Schultz and Robert Braun believe that abortion is immoral and unjust. Between April 20 and May 20, 1985, Schultz, Braun, and groups of

prolife demonstrators, ranging in size from 11 to more than 40 persons, have on at least six occasions picketed in front of the home of Dr. Benjamin M. Victoria who performs abortions at facilities in Appleton and Milwaukee.

The Town of Brookfield is a residential suburb of the City of Milwaukee and has a population of approximately 4,300 persons. The Town's police force consists of a chief and eight officers. The street on which the Victoria family lives is within a subdivision of the Town zoned exclusively for single-family residences. The road surfaces in the subdivision are approximately 30 feet wide and blacktopped. During the winter the roads are narrowed further by snow piles which accumulate due to plowing. There are no sidewalks, curbs, gutters, or street lights.

On May 7, 1985, the Town of Brookfield enacted an ordinance which provided as follows:

9.17 RESIDENTIAL PICKETING . . .

(2) PICKETING RESIDENCE OR DWELLING UNLAWFUL. It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual. Nothing herein shall be deemed to prohibit (a) picketing in any lawful manner during a labor dispute of the place of the place [sic] of employment involved in such labor dispute, or (b) the holding of a meeting or assembly on any premises commonly used for the discussion of subjects of general public interest.

On the following day, defendant Town Attorney Cramer informed plaintiff Schultz that he had instructed defendant Chief of Police Ross not to enforce the new ordinance pending Cramer's research into its constitutionality. The results of this research apparently led to the repeal of the above ordinance and the passage on May 15, 1985, of a substitute ordinance as § 9.17, General Code, Town of Brookfield, which provides as follows:

9.17 RESIDENTIAL PICKETING. (1) DECLARATION. It is declared that the protection and preservation of the home is the keystone of democratic government; that the public health and welfare and the good order of the community require that members of the community enjoy in their homes and dwellings a feeling of well-being, tranquility, and privacy, and when absent from their homes and dwellings, carry with them the sense of security inherent in the assurance that they may return to the enjoyment of their homes and dwellings; that the practice of picketing before or about residences and dwellings causes emotional disturbance and distress to the occupants; obstructs and interferes with the free use of public sidewalks and public ways of travel; that such practice has as its object the harassing of such occupants; and without resort to such practice full opportunity exists, and under the terms and provisions of this chapter will continue to exist for the exercise of freedom of speech and other constitutional rights; and that the provisions hereinafter enacted are necessary for the public interest to avoid the detrimental results herein set forth. . . .

(2) PICKETING RESIDENCE OF DWELLING UNLAWFUL. It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield.

(3) PENALTY FOR VIOLATIONS. Any person violating the provisions of this section of the Town Code of the Town of Brookfield shall upon conviction for a first offense forfeit not

less than \$5 nor more than \$300.00, together with the costs of prosecution, and in default of payment of such forfeiture and costs of prosecution, shall be imprisoned in the County Jail until such forfeiture and costs are paid, but not to exceed 30 days.

Any person who shall be guilty of violating this section of the Town Code of the Town of Brookfield who has previously been convicted of a violation thereof within one year, shall upon conviction thereof forfeit not less than \$100.00 nor [sic] more than \$500.00 for each such offense, together with the costs of prosecution and in default of payment of such forfeiture and costs, shall be imprisoned in the County Jail until such forfeiture and costs are paid, but not exceeding 90 days.

The General Code of the Town of Brookfield includes a number of ordinances designed to preserve peace and order in the community. These include §§ 9.05 Obstructing Streets and Sidewalks, 9.06 Loud and Unnecessary Noise Prohibited, 9.08 Loitering Prohibited, 9.09 Destruction of Property Prohibited, 9.10 Littering Prohibited, 9.943.13 Criminal Trespass to Land, 9.943.14 Criminal Trespass to Dwelling, and 9.947.01 Disorderly Conduct.

On May 18, 1985, defendant Cramer informed plaintiffs that he had instructed the Brookfield Chief of Police to enforce the new ordinance beginning on its effective date, May 21, 1985. Plaintiffs continued picketing the Victoria residence through May 20 but have refrained from picketing since that time for fear of arrest and prosecution under the new ordinance.

The picketing seems to have been conducted for the most part in a peaceable and orderly fashion. The Town police never had occasion to make an arrest, though this may be a function of the limited surveillance they were able to conduct. On at least one occasion picketers entered onto the Victoria property to tie red ribbons to shrubbery growing there, place a protect sign at the front door of the Victoria house, and tie

another red ribbon to the front door knob.\* Mrs. Victoria and one of the Victoria children claim that on one occasion the picketers temporarily prevented them from leaving their residence. The Victorias also believe that picketers photographed their children and residence.

The picketers carried signs with a variety of inscriptions including "Stop Abortion Now," "Aborted Babies Sold for 'Cosmetics,'" "Abortion is Legal Murder," "God Bless America," and "Forgiveness Is Yours for the Asking." Picketers on occasion sang and cheered or shouted other slogans that witnesses say include references to Victoria as a "baby killer." Picketers conversed with passers-by, including at least one neighbor who was told that Victoria was a baby killer. The

---

\* At the oral argument, plaintiffs' counsel explained that the red ribbons were symbols used by the anti-abortionists from Appleton, Wis.

parent and grandparent of a five-year-old child claim that a woman carrying a cross, who was marching with other picketers to the Victoria home, told the child that a baby killer lived nearby and that the child should not go to the Victoria house. The child apparently became frightened following this encounter and would not leave his grandparent's home for the remainder of the day.

Some of the picketers belong to an anti-abortion group in the Milwaukee area where many of them live. Others come from the area of Appleton, a city about 100 miles north of Milwaukee where one of Dr. Victoria's clinics is located. The picketers chose the Victoria residence as a target for picketing because, in the words of plaintiff Schultz:

[ ]picketing at locations at which Victoria performs abortions would not accomplish what picketing on the public street by his house can accomplish. Moreover, the greater media coverage of residential picketing allows us to reach audiences who might not otherwise

receive our messages. As an additional concern, we do not wish to interfere with efforts of sidewalk counselors to contact prospective abortion clients; picketing near the Victorias' residence (away from the site of the abortions) removes the possibility of such problems, while more effectively conveying our messages to the abortionist and those in his community.

Affidavit of Sandra Schultz (filed July 17, 1985) at 4. Both print and electronic news media in the Milwaukee metropolitan area have covered the picketing which took place at the Victoria residence.

#### CONCLUSIONS OF LAW

A district court may issue a preliminary injunction only after the moving party demonstrates that--

(1) it has at least a reasonable likelihood of success on the merits, (2) it has no adequate remedy at law and will otherwise be irreparably harmed, (3) the threatened injury to it outweighs the threatened harm the preliminary injunction may cause the defendants, and (4) the granting of the preliminary injunction will not disserve the public interest.

Syntex Ophthalmics, Inc. v. Tsuetaki, 701 F.2d 677, 681 (7th Cir. 1983) (quoting Machlett Laboratories, Inc. v. Techny Industries, Inc., 665 F.2d 795, 796-97 (7th Cir. 1981)).

I find on the facts above that plaintiffs are entitled to a preliminary injunction against the enforcement of the Town of Brookfield's residential picketing ordinance. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," Libertarian Party of Indiana v. Packard, 742 F.2d 981, 985 (7th Cir. 1984) (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion)), for which a legal remedy is inadequate. The injury defendants would sustain by virtue of a preliminary injunction seems relatively small. Granting the injunction would not disserve the public interest. The only real issue here is whether plaintiffs are reasonably likely to

succeed on the merits. I conclude that they are.

I. Protected Activity

Picketing, as a means of expressing one's opinion on a public issue, "has always rested on the highest rung of the hierarchy of First Amendment values." Carey v. Brown, 447 U.S. 455, 467 (1980). No less than the door-to-door distribution of handbills, picketing is "essential to the poorly financed causes of little people." See Martin v. City of Struthers, 319 U.S. 141, 146 (1943).

II. Public Forum

It is settled law that public places associated historically with the exercise of free speech, such as streets, parks, and sidewalks, are to be regarded as public forums. United States v. Grace, 461 U.S. 171, 177 (1983). Residential streets in neighborhoods where there are neither sidewalks nor street lights are

just as much associated with free expression as are the central squares of our cities and towns. See Carey v. Brown, 447 U.S. at 460.

### III. Standard

The test for permissible time, place, and manner regulation of speech in a public forum has been restated recently by the United States Supreme Court:

In . . . quintessential public forums, the government may not prohibit all communicative activity. . . . The State may . . . enforce regulations of the time, place and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). The defendants have presented no authority suggesting that single family, residential surroundings make a public street anything less than a quintessential public forum. Therefore, this ordinance must pass the Perry four-pronged test.

A. Content Neutral

The ordinance here in question is content neutral. All residential picketing, regardless of the cause on behalf of which it is conducted, is unlawful in the Town of Brookfield. I see little merit in plaintiffs' argument that an implied exception for labor picketing must be read into an ordinance, the legislative history of which shows a precisely contrary intent.

B. Significant Interest

No doubt the interests which the Town of Brookfield seek to advance by this ordinance are significant. The safety of picketers and passers-by is a serious concern where streets are narrow, there are no sidewalks, and traffic may be heavy. The Town also has an interest in preserving domestic privacy.

Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the

tribulations of their daily pursuits, is surely an important value. . . [and] . . . [t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.

Carey v. Brown, 447 U.S. at 471. Speech may be regulated to protect privacy. See Martin v. City of Struthers, 319 U.S. at 148. Such interests are significant enough to justify narrowly tailored time, place, and manner regulations of communicative conduct.

C. Not Narrowly Tailored

The Town of Brookfield's ordinance is not, however, narrowly tailored to advance these interests. It completely bans all picketing in residential neighborhoods. One can imagine neutral time, place, and manner regulations, short of a ban on residential picketing, which would go a long way toward the Town's safety and domestic privacy goals. It might be possible to meet safety concerns, for

example, by limiting the time of picketing and the number of persons who may picket at one time. In Wisconsin at least, winter road conditions may make it appropriate to impose some form of seasonal restriction as well. The privacy and tranquility of domestic life can be secured without totally banning picketers from the streets of residential neighborhoods, because some types of peaceful picketing have a negligible impact on privacy interests. Carey v. Brown, 447 U.S. at 469. Picketing can be limited to certain hours. A limit on the number of picketers who may assemble at a residence at a given time would further reduce the intrusiveness of picketing. An absolute ban, however, against a form of protected speech cannot be permitted to stand.

Much communicative activity in an open, and largely urban, society intrudes upon personal life and disturbs its

tranquility. This is at once an unavoidable weakness and a great strength of free speech as it is practiced in this country.

The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance.

Martin v. City of Struthers, 319 U.S. at 143.

D. Alternatives

Because defendants' ordinance fails the "narrowly tailored means" prong of the test, it is unnecessary to determine whether plaintiffs have open to them ample alternative channels of communication. I remark only that the crucial word here seems to be "ample." If "ample" means that alternative channels for plaintiffs' speech must be equally effective to allow plaintiffs to stir up the Victoria family, the family's neighbors, the Town of Brookfield, and the City of Milwaukee and allow plaintiffs to garner as much

publicity, then this prong of the test cannot be satisfied here and will hardly ever be satisfied. Picketing subject to legal challenge will almost always attract more media attention than picketing that is not. Thus, if an alternative channel must be "ample" in the sense that it affords the same publicity to speech as does the challenged channel, then speech which more intrudes on people's privacy and is more outrageous (and therefore, unfortunately, more newsworthy) will be for these reasons more likely to receive the protection of the First Amendment. This would be a regrettable development in our First Amendment jurisprudence.

If, on the other hand, "ample" means only that alternative channels must allow plaintiffs to communicate the whole substance of their ideas and emotions to all who are willing to listen, then it seems to me that plaintiffs have such alternative channels in this case. They may distribute leaflets in the Victorias'

neighborhood, Martin v. City of Struthers, 319 U.S. at 146-49; they may march past the Victoria home, see Gregory v. Chicago, 394 U.S. 111 (1969); and, of course, they may picket other more public sites.

I conclude, nevertheless, that the Town of Brookfield's residential picketing ordinance is likely to fail the test of a constitutional time, place, and manner regulation of speech in a public forum, and that plaintiffs, therefore, are reasonably likely to succeed on the merits and are thus entitled to a preliminary injunction.

Accordingly, for all the reasons stated,

IT IS THEREFORE ORDERED that the plaintiffs' motion for a preliminary injunction be and hereby is granted, and the defendants are enjoined from enforcing § 9.17(2) of the ordinances of the Town of Brookfield.

IT IS FURTHER ORDERED that if the defendants do not appeal and the court does not receive within sixty days from the filing date of this order a request in writing from either party for a trial on the plaintiffs' request for a permanent injunction, the preliminary injunction issued today will become permanent, and judgment will be entered in favor of the plaintiffs and against the defendants without further notice from the court.

Dated at Milwaukee, Wisconsin, this 7th day of October, 1985.

BY THE COURT:

John W. Reynolds  
Chief Judge

APPENDIX D

IN THE UNITED STATES  
COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Filed July 16, 1987

-----  
SANDRA C. SCHULTZ and  
ROBERT C. BRAUN,

Appellees,

vs.

RUSSELL FRISBY, GEORGE R. HUNT,  
ROBERT WARGOWSKI, HARLAN ROSS,  
CLAYTON A. CRAMER, and the  
TOWN OF BROOKFIELD,

Appellants.  
-----

NOTICE OF APPEAL TO THE SUPREME COURT  
OF THE UNITED STATES

Notice is hereby given that  
Russell Frisby, George R. Hunt,  
Robert Wargowski, Harlan Ross,  
Clayton A. Cramer, and the Town of  
Brookfield, appellants in this case,  
hereby appeal to the Supreme Court of  
the United States from the judgment  
of the United States Court of Appeals  
for the Seventh Circuit dated  
April 30, 1987, affirming the  
judgment of the United States  
District Court for the Eastern  
District of Wisconsin dated  
October 7, 1985.

This appeal is taken pursuant to 28  
U.S.C. § 1254(2).

---

Harold H. Fuhrman  
710 North Plankinton Avenue  
Suite 440  
Milwaukee, WI 53203  
(414) 276-0560

George A. Schmus  
10701 West National Avenue  
West Allis, WI 53227  
(414) 321-1400

Attorneys for Appellants

APPENDIX E

Section 9.17, General Code,  
Ordinances of Town of Brookfield,  
Wisconsin:

9.17 RESIDENTIAL PICKETING.

(1) DECLARATION. It is declared that the protection and preservation of the home is the keystone of democratic government; that the public health and welfare and the good order of the community require that members of the community enjoy in their homes and dwellings a feeling of wellbeing, tranquility, and privacy, and when absent from their homes and dwellings, carry with them the sense of security inherent in the assurance that they may return to the enjoyment of their homes and dwellings; that the practice of picketing before or about residences and dwellings causes emotional disturbance and distress to the occupants; obstructs and

interferes with the free use of public sidewalks and public ways of travel; that such practice has as its object the harassing of such occupants; and without resort to such practice full opportunity exists, and under the terms and provisions of this chapter will continue to exist for the exercise of freedom of speech and other constitutional rights; and that the provisions hereinafter enacted are necessary for the public interest to avoid the detrimental results herein set forth and are enacted by the Town Board of the Town of Brookfield pursuant to the provisions of Section 61.34(1) Wisconsin Statutes, which statute gives powers to the Village Board to enact these regulations, which powers are available to the Town Board pursuant to the Village Board powers assumed by the Town Board pursuant to the

provisions of Section 60.10(2)(c) Wisconsin Statutes.

(2) PICKETING RESIDENCE OR DWELLING UNLAWFUL. It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield.

(3) PENALTY FOR VIOLATIONS. Any person violating the provisions of this section of the Town Code of the Town of Brookfield shall upon conviction for a first offense forfeit not less than \$5.00 nor more than \$300.00, together with the costs of prosecution, and in default of payment of such forfeiture and costs of prosecution, shall be imprisoned in the County Jail until such forfeiture and and costs are paid, but not to exceed 30 days.

Any person who shall be guilty of violating this section of the Town Code of the Town of Brookfield who

has previously been convicted of a violation thereof within one year, shall upon conviction thereof forfeit not less than \$100.00 nore [sic] more than \$500.00 for each offense, together with the costs of prosecution and in default of payment of such forfeiture and costs, shall be imprisoned in the County Jail until such forfeiture and costs are paid, but not exceeding 90 days.